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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 DONALD L. PATE,

12 Plaintiff,

13 v.

14 KITSAP COUNTY, a political subdivision of
15 the State of Washington, TERRY K.
16 COUSINS, INDIVIDUALY AND IN HER
17 OFFICIAL CAPACITY AS A Kitsap County
18 Corrections Officer; and STATE OF
19 WASHINGTON,

20 Defendants.

21 NO. C07-5331 KLS

22 ORDER GRANTING PARTIAL
23 SUMMARY JUDGMENT

24 This matter comes before the Court on the Defendants' Motion for Summary Judgment (Dkt.
25 #69). The Plaintiff has filed his response and the Defendants filed their Reply. The matter is now ripe for
26 consideration by the Court.

27 CLAIMS REMAINING FOR RESOLUTION

28 The Plaintiff alleged four causes of action, to include (1) violation of his 42 U.S.C. § 1983 civil
rights; (2) negligent infliction of emotional distress; (3) negligence; and (4) deliberate indifference.

29 The Plaintiff conceded, in his response, that he does not have a viable claim for negligent
30 infliction of emotional distress and that he does not have a § 1983 claim against Kitsap County. In
31 addition, the Court notes that the claim of deliberate indifference is repetitious of the § 1983 claim.

Order Granting Partial Summary Judgment

1 The claims remaining, therefore, for resolution include (1) violation of § 1983 claim by defendant
2 Terry K. Cousins and (2) negligence on the part of Kitsap County.

3 Based on the pleadings filed in support of and in opposition to the Defendants motion, the Court is
4 granting summary judgment as to the Plaintiff's claim that defendant Terry K. Cousins violated his
5 constitutional rights.

6 However, with regard to the negligence claim, this court will be schedule oral argument as to that
7 claim.

FACTS

9 The following recitation of facts is presented in the light most favorable to the non-moving party,
10 Donald Pate, and just to the extent they are pertinent to the 41 U.S.C. § 1983 Unless noted otherwise,
11 they are undisputed.

12 On July 12, 2005, Donald Pate was an inmate at the Kitsap County Corrections and Detention
13 Center, having been transferred there from Stafford Creek Corrections Center for the purpose of testifying
14 in a criminal trial.

15 On July 21, 2005 Mr. Pate fell as he was getting down from his upper bunk bed. As a result of the
16 fall he broke his left wrist. The specifics as to how the fall occurred are in dispute and not relevant for
17 determination regarding the Plaintiff's § 1983 claim.

18 Mr. Pate was transferred to Harrison Memorial Hospital and properly treated. He was returned to
19 the Kitsap County Jail on July 24, 2005 at approximately 1:30 p.m. He was in a single-man cell in one of
20 the South Pods - which Mr. Pate refers to as "the hole." According to Lt. Roxane Payne, these units are
21 frequently utilized as housing for inmates with medical needs or restrictions, because contact with other
22 inmates is restricted, and only lower-bunks are available.

23 Sometime around 4:00 p.m. on July 24, 2005, after his placement in this single-man cell, Mr. Pate
24 stood up, passed out and fell to the floor, and injured himself again. A nurse responded to Mr. Pate in his
25 cell and the notes show that an assessment was made by the nurse at that time. Mr. Pate was transferred
26 to the hospital at approximately 4:23 p.m. He returned to the Kitsap County jail by 11:00 p.m. that same
27 evening.

28 Mr. Pate complains that after his fall on July 24, 2005, and before he was transported to the

1 hospital, that Officer Cousins and a nurse were talking among themselves and, to his understanding, were
2 planning on only taking his temperature and sending him back. It was only after he stated that he was
3 going to give this information to his attorney that a call was made to the hospital and he was taken back
4 to the hospital.

5 Upon his return Mr. Pate was housed in a crisis cell which is a padded cell that has no fixed
6 furnishings. The cell has a hole in the floor to use for the toilet and a mattress on the floor. The cell is
7 monitored by video surveillance and has a window through which officers can check on the inmate on an
8 hourly basis.

9 Mr. Pate asserts that Defendant Cousins's was responsible for placing him in the crisis cell. He
10 reached this conclusion based on what a lady told him. At his deposition, he also asserted that Defendant
11 Cousins "taunted" him through the night. The evidence is, however, that Defendant Cousins's worked the
12 day shift which runs from 6:00 a.m. to 2:00 p.m. She was not present when Mr. Pate was returned from
13 the hospital that night and the records indicate that Corrections Sgt. Johnson determined Mr. Pate's
14 housing on his return from the hospital. Since Mr. Pate's assertion was based on hearsay and not personal
15 knowledge, this is not a material disputed fact. With regard to the "taunting" allegation, if it did occur, it
16 would have to have been after 6:00 a.m.

17 On the morning of July 25, 2005 the on-duty nurse, Dara Morgan, examined Mr. Pate and made
18 note of her findings. The plan noted that Mr. Pate was leaving for prison that day and a transfer summary
19 was done. A call would be placed regarding Mr. Pate's fever and hospital records will be sent. She
20 wanted him to drink six-ounce glasses of water every half hour and she gave him medication at 9:00 a.m.
21 She noted that Mr. Pate was released from the crisis cell before the scheduled check at 10:30 a.m. He was
22 transported back to the Washington Corrections Center in Shelton at 11:30 a.m. that same morning.

23 In his declaration dated November 7, 2008 Mr. Pate, for the first time, specifically asserts that
24 Defendant Cousins ignored his requests for help because of the pain he felt. His deposition testimony,
25 however, was vague as to who he complained of pain to other than to the guards in general. This dispute
26 in facts is not, however, a material dispute.

27 **SUMMARY JUDGMENT STANDARD**

28 Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment "if the pleadings,

1 depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that
2 there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of
3 law.” The moving party is entitled to judgment as a matter of law when the nonmoving party fails to
4 make a sufficient showing on an essential element of a claim on which the nonmoving party has the
5 burden of proof. *Celotex Corp., v. Catrett*, 477 U.S. 317, 323 (1985).

6 There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a
7 rational trier of fact to find for the nonmoving party. *Matsushita elec. Indus. Co. V. Zenith Radio Corp.*,
8 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not
9 simply “some metaphysical doubt.”). *See also* Fed. R. Civ. P. 56 (e). Conversely, a genuine dispute over
10 a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a
11 judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
12 253 (1986); *T.W. Elec. Service In. V. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th
13 cir. 1987).

24 U.S.C. § 1893 - CIVIL RIGHTS VIOLATION

15 Mr. Pate alleges that Defendant Terry Cousins violated his civil rights by showing deliberate
16 indifference to his medical needs. The only time frame in which this claim applies is between 6:00 a.m.
17 (when Defendant Cousins started her shift that morning) and 10:30 a.m. on July 25, 2005, when the
18 Plaintiff was removed from the crisis cell. There can be no claim for deliberate indifference for the time
19 between his second fall and being taken to the hospital as the records show this all occurred within 30
20 minutes and that he was in fact seen for his medical needs at the hospital.

21 42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law,
22 deprives another of rights guaranteed under the constitution. To succeed on such a claim, the Plaintiff
23 must prove that the following: (1) that the individual defendant deprived him of a federal constitutional or
24 statutory right; and (2) the defendant was acting under color of law. This second factor requires a
25 showing of personal participation by the named defendant.

26 It is not disputed in this case that Defendant Cousins was acting under color of state law. The
27 issue is whether or not Defendant Cousins actions were deliberately indifferent to Mr. Pate's serious
28 medical needs. Defendant Cousins would be liable under this claim upon a showing that she not only

1 denied the Plaintiff needed medical care and that she knew or and disregarded an excessive risk to inmate
2 health and safety. As the Defendants noted in their brief, “In order to know of the excessive risk, it is not
3 enough that the person merely ‘be aware of facts from which the inference could be drawn that a
4 substantial risk of serious harm exists, []he must also draw the inference”...If a person should have been
5 aware of the risk, but was not, then the person has not violated the Eighth Amendment, no matter how
6 severe the risk.” *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1187 (9th Cir. 2002)(quoting
7 *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996).

The undisputed material facts before this court do not support Mr. Pate's claim of deliberate indifference. First, the undisputed evidence before the Court is that Mr. Pate was tended to by a nurse on duty, was given medication and examined. The nurse noted that Mr. Pate had a fever and her plan was to pass that information on to WCC. At the most, according to Mr. Pate Defendant Cousins "taunted" him and ignored some general requests for help. He was, however, being cared for by a medical person. Further, there is no evidence before the court that Mr. Pate faced a "substantial risk of serious harm." He had been seen at the hospital twice, had been seen by the nurse on his return to Kitsap County detention facility, and had been given pain medication.

In addition, no evidence has been presented to support a conclusion or even an inference that Defendant Cousins ever knew that a substantial risk of serious harm existed nor was there any reason for her to suspect such a thing. Mr. Pate was under the care of the on-duty nurse who had seen him and provided him with appropriate medical care. That care noted that Mr. Pate had a fever and was feeling pain. She made the determination as to what should or should not be done and that determination was not interfered with in any way by Defendant Cousins.

22 There is no showing of deliberate indifference by Defendant Cousins and this claim is
23 DISMISSED.

24 DATED this 20th day of November, 2008.


Karen L. Strombom
United States Magistrate Judge